

In the Matter of the Application of)
)
HAWAII ELECTRIC LIGHT COMPANY, INC.) DOCKET NO. 2017-0122
)
For Approval of a Power Purchase)
Agreement for Renewable Dispatchable)
Firm Energy and Capacity.)
)

(1) DENYING LIFE OF THE LAND'S MOTION FOR RECONSIDERATION/CLARIFICATION OF ORDER NO. 37852 FILED JULY 12, 2021; (2) DENYING TAWHIRI POWER LLC'S MOTION FOR RECONSIDERATION OF ORDER NO. 37852, FILED ON JUNE 30, 2021, FILED JULY 12, 2021; (3) DENYING HU HONUA BIOENERGY, LLC'S MOTION FOR THE COMMISSION TO CONSIDER ACT 82 AND ADDRESS ITS IMPACT ON ORDER NO. 37852 REOPENING DOCKET FILED JULY 20, 2021; (4) PARTIALLY GRANTING THE DIVISION OF CONSUMER ADVOCACY'S MOTION FOR LEAVE TO RESPOND FILED JULY 23, 2021; AND (5) DISMISSING ALL OTHER RELATED PROCEDURAL MOTIONS

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)	
)	
HAWAII ELECTRIC LIGHT COMPANY, INC.)	DOCKET NO. 2017-0122
)	
For Approval of a Power Purchase)	ORDER NO. 37910
Agreement for Renewable Dispatchable)	
Firm Energy and Capacity.)	
_____)	

(1) DENYING LIFE OF THE LAND'S MOTION FOR
RECONSIDERATION/CLARIFICATION OF ORDER NO. 37852 FILED
JULY 12, 2021; (2) DENYING TAWHIRI POWER LLC'S MOTION FOR
RECONSIDERATION OF ORDER NO. 37852, FILED ON JUNE 30, 2021,
FILED JULY 12, 2021; (3) DENYING HU HONUA BIOENERGY, LLC'S
MOTION FOR THE COMMISSION TO CONSIDER ACT 82 AND ADDRESS ITS
IMPACT ON ORDER NO. 37852 REOPENING DOCKET FILED JULY 20, 2021;
(4) PARTIALLY GRANTING THE DIVISION OF CONSUMER ADVOCACY'S
MOTION FOR LEAVE TO RESPOND FILED JULY 23, 2021; AND
(5) DISMISSING ALL OTHER RELATED PROCEDURAL MOTIONS

By this Order,¹ the Public Utilities Commission
("Commission"), addresses the various procedural motions arising

¹The Parties to this docket are HAWAII ELECTRIC LIGHT COMPANY, INC. ("HELCO"), HU HONUA BIOENERGY, LLC ("Hu Honua") (collectively, HELCO and Hu Honua are referred to as "Applicants"), and the DIVISION OF CONSUMER ADVOCACY ("Consumer Advocate"). The Commission has also granted Participant status to LIFE OF THE LAND ("LOL"), TAWHIRI POWER, LLC ("Tawhiri"), and HAMAKUA ENERGY, LLC ("Hamakua"). See Order No. 34554, "Opening a Docket to Review and Adjudicate Hawaii Electric Light Company, Inc.'s Letter Request for Approval of Amended and Restated Power Purchase Agreement, Filed in Docket No. 2012-0212 on May 9, 2017," filed May 17, 2017 ("Order No. 34554").

from Order No. 37852,² which re-opened this docket following the Hawaii Supreme Court's ("Court") decision in Matter of Hawaii Elec. Light Co., Inc., No. SCOT-20-0000569, filed May 24, 2021 ("HELCO II"). Specifically, the Commission: (1) denies the motions for reconsideration of Order No. 37852 filed by LOL and Tawhiri;³ (2) denies Hu Honua's motion for the Commission to consider Act 82 and its impact on Order No. 37852;⁴ (3) partially grants the Consumer Advocate's motion for leave to jointly respond to LOL's and Tawhiri's Motions for Reconsideration, and, in doing so, modifies the statement of issues established in Order No. 37852;⁵ and (4) in light of the above, dismisses all other related procedural motions as moot.

²Order No. 37852, "Reopening the Docket," filed June 30, 2021 ("Order No. 37852").

³"Life of the Land's Motion for Reconsideration/Clarification of Order No. 37852 or in the Alternative to Rescind the 2017 Waiving of the Competitive Bidding Framework; Memorandum in Support of Motion; and Certificate of Service," filed July 12, 2021 ("LOL Motion for Reconsideration"); and "Tawhiri Power LLC's Motion for Reconsideration of Order No. 37852, Filed on June 30, 2021; Memorandum in Support of Motion; and Certificate of Service," filed July 12, 2021 ("Tawhiri Motion for Reconsideration").

⁴"Hu Honua Bioenergy, LLC's Motion for the Commission to Consider Act 82 and Address Its Impact on Order No. 37852 Reopening Docket; Memorandum in Support of Motion; and Certificate of Service," filed July 20, 2021 ("Hu Honua Act 82 Motion").

⁵"Division of Consumer Advocacy's Motion for Leave to Respond," filed July 23, 2021 ("CA Motion to Respond").

In regard to the last ruling, this results in the dismissal of: (1) Hu Honua's motions for leave to file replies to LOL's and Tawhiri's Motion for Reconsideration;⁶ (2) HELCO's motion for leave to file a consolidated reply to LOL's and Tawhiri's Motions for Reconsideration;⁷ (3) LOL's motion to strike Hu Honua's Act 82 Motion;⁸ (4) Tawhiri's motion to strike Hu Honua's Act 82 Motion;⁹ (5) LOL's motion to suspend information requests,

⁶"Hu Honua Bioenergy, LLC's Motion for Leave to File a Reply to Life of the Land's Motion for Reconsideration/Clarification of Order No. 37852 or in the Alternative to Rescind the 2017 Waiving of the Competitive Bidding Framework, Filed July 12, 2021; Exhibit 'A'; and Certificate of Service," filed July 19, 2021 ("Hu Honua Motion for Leave to Reply to LOL Motion for Reconsideration"); and "Hu Honua Bioenergy, LLC's Motion for Leave to File a Reply to Tawhiri Power LLC's Motion for Reconsideration of Order No. 37852, Filed July 12, 2021; Exhibit 'A'; and Certificate of Service," filed July 19, 2021 ("Hu Honua Motion for Leave to Reply to Tawhiri Motion for Reconsideration").

⁷"Hawaii Electric Light Company, Inc.'s Motion for Leave to File Consolidated Reply in Response to (1) Participant Life of the Land's Motion for Reconsideration/Clarification of Order No. 37852 or in the Alternative to Rescind the 2017 Waiving of the Competitive Bidding Framework; and (2) Participant Tawhiri Power LLC's Motion for Reconsideration of Order No. 37852; Exhibit 'A'; and Certificate of Service," filed July 19, 2021 ("HELCO Motion for Leave to Reply to LOL and Tawhiri Motions for Reconsideration").

⁸"Life of the Land's Motion to Strike; Memorandum in Support of Motion to Strike; Verification; and Certificate of Service," filed July 21, 2021 ("LOL Motion to Strike Hu Honua Act 82 Motion").

⁹"Tawhiri Power LLC's Motion to Strike Hu Honua Bioenergy, LLC's Motion for the Commission to Consider Act 82 and Address Its Impact on Order No. 377852 Reopening Docket; Memorandum in Support of Motion to Strike; and Certificate of Service,"

including Tawhiri's joinder thereto;¹⁰ and (6) HELCO's motion to strike LOL's Motion to Suspend, including Hu Honua's joinder thereto.¹¹

The Commission's reasoning is discussed below.

I.

BACKGROUND

On July 28, 2017, the Commission issued Decision and Order No. 34726, approving HELCO's request for a waiver from the Commission's competitive bidding framework ("Framework") for the

filed July 26, 2021 ("Tawhiri Motion to Strike Hu Honua Act 82 Motion").

¹⁰"Life of the Land's Motion to Suspend Information Request Process Pending Resolution of Statement of Issues Motions; Memorandum in Support of Motion; Verification; and Certificate of Service," filed July 27, 2021 ("LOL Motion to Suspend"); and "Tawhiri Power LLC's Joinder to Life of the Lands' [sic] Motion to Suspend Information Request Process Pending Resolution of Statement of Issues Motions and Memorandum in Support Filed on July 27, 2021; and Certificate of Service," filed July 28, 2021 ("Tawhiri Joinder to LOL Motion to Suspend").

¹¹"Hawaii Electric Light Company, Inc.'s Motion to Strike, or in the Alternative for Leave to File a Reply in Response to Participant Life of the Land's Motion to Suspend Information Request Process; 'Exhibit A'; and Certificate of Service," filed July 30, 2021 ("HELCO Motion to Strike LOL Motion to Suspend"); and "Hu Honua Bioenergy, LLC's Joinder to Hawaii Electric Light Company, Inc.'s Motion to Strike, or in the Alternative for Leave to File a Reply in Response to Participant Life of the Land's Motion to Suspend Information Request Process, Filed July 30, 2021; and Certificate of Service," filed August 3, 2021 ("Hu Honua Joinder to HELCO Motion to Strike LOL Motion to Suspend').

Amended PPA,¹² under which HELCO would purchase electricity from a biomass project to be developed by Hu Honua ("the Project"), and approving the Amended PPA.

LOL appealed Decision and Order No. 34726 to the Court, where it was assigned Case No. SCOT-17-0000630.

On May 10, 2019, the Court issued its decision in SCOT-17-0000630 ("HELCO I"), which vacated Decision and Order No. 34726 and remanded the matter back to the Commission for further proceedings.¹³

On July 9, 2020, the Commission issued Order No. 37205, which, in relevant part, denied HELCO's request for a waiver from the Framework for an Amended PPA with Hu Honua related to the Project.¹⁴ In so doing, the Commission determined that HELCO's request for a waiver from the Framework was a threshold issue, and as such, the Commission's denial of the waiver mooted consideration of the merits of the Amended PPA, including the

¹²"Hawaii Electric Light Company, Inc.'s Amended and Restated Power Purchase Agreement dated May 5, 2017," filed May 9, 2018 ("Amended PPA").

¹³See HELCO I, 145 Hawaii 1, 28, 445 P.3d 673, 700 (2019).

¹⁴Order No. 37205, "Denying Hawaii Electric Light Company, Inc.'s Request for a Waiver and Dismissing Letter Request for Approval of Amended and Restated Power Purchase Agreement," filed July 9, 2020 ("Order No. 37205").

impacts of greenhouse gas ("GHG") emissions associated with the Project.¹⁵

On September 16, 2020, Hu Honua appealed the Commission's decision in Order No. 37205 to the Court, where it was assigned Case No. SCOT-20-0000569.

On May 24, 2021, Court issued HELCO II, in which the Court found that the Commission had erred in its reading of HELCO I, which, the Court stated, focused on the need to explicitly consider GHG emissions associated with the Project in determining whether to approve the Amended PPA, and "did not disturb, modify, or vacate the 2017 waiver."¹⁶ Consequently, the Court concluded that "[b]ecause HELCO I had no impact on the 2017 waiver, the waiver was still in effect when the [Commission] re-opened Docket No. 2017-0122," and thus, "was still in effect when the [Commission] issued Order No. 37205."¹⁷ In sum, the Court ruled:

We vacate [Commission] Order Nos. 37205 and 37306.

As a result, the parties are fixed in the same position they were in following HELCO I: the [Commission's] 2017 approval of the Amended PPA remains vacated, the 2017 waiver remains valid and in force, and the [Commission], in considering the Amended PPA, remains obligated to follow the instructions we provided in HELCO I. We thus remand this case to the [Commission] for a hearing on the Amended PPA that "complies with procedural due

¹⁵Order No. 37205 at 43 and 44.

¹⁶HELCO II at 6-7.

¹⁷HELCO II at 8.

process” as well as the requirements of HRS Chapter 269.¹⁸

On June 23, 2021, the Court issued its Judgment on Appeal for SCOT-20-0000569, vacating Order Nos. 37205 and 37306 and remanding this matter back to the Commission.

On June 30, 2021, the Commission issued Order No. 37852 which, in relevant part, established a statement of issues to govern this proceeding on remand (“Statement of Issues”).¹⁹

In response to Order No. 37852, LOL, Tawhiri, and Hu Honua all filed motions seeking to modify the Statement of Issues, which has triggered successive procedural filings, as summarized below:

Filing Date	Filing Document
July 12, 2021	LOL Motion for Reconsideration
July 12, 2021	Tawhiri Motion for Reconsideration
July 19, 2021	Hu Honua Motion for Leave to Reply to LOL Motion for Reconsideration
July 19, 2021	Hu Honua Motion for Leave to Reply to Tawhiri Motion for Reconsideration
July 19, 2021	HELCO Motion for Leave to Reply to LOL and Tawhiri Motions for Reconsideration
July 20, 2021	Hu Honua Act 82 Motion
July 21, 2021	LOL Motion to Strike

¹⁸HELCO II at 8-9.

¹⁹Order No. 37852 at 7-8.

Filing Date	Filing Document
July 23, 2021	Letter from the Consumer Advocate regarding Hu Honua Act 82 Motion ²⁰
July 23, 2021	Consumer Advocate's Motion to Respond
July 27, 2021	Tawhiri Motion to Strike
July 27, 2021	LOL Motion to Suspend
July 28, 2021	Tawhiri Joinder to LOL Motion to Suspend
July 28, 2021	Consumer Advocate consolidated response to LOL and Tawhiri Motions to Strike and Hu Honua Act 82 Motion ²¹
July 28, 2021	Hu Honua memorandum in opposition to LOL Motion to Strike ²²
July 30, 2021	HELCO Motion to Strike LOL Motion to Suspend
August 2, 2021	Hu Honua opposition to Tawhiri Power's Motion to Strike ²³

²⁰Letter From: Consumer Advocate To: Commission Re: Docket No. 2017-0122 - Re Hu Honua Bioenergy, LLC's Motion for the Commission to Consider Act 82 and Address Its Impact on Order No. 37852 Reopening Docket, filed July 23, 2021 ("CA Letter").

²¹"Division of Consumer Advocacy's Consolidated Response to Life of the Land's Motion to Strike and Tawhiri Power LLC's Motion to Strike and Hu Honua Bioenergy, LLC's Motion for the Commission to Consider Act 82 and Address Its Impact on Order No. 37852 Reopening Docket," filed July 28, 2021 ("CA Consolidated Response").

²²"Hu Honua Bioenergy , LLC's Memorandum in Opposition to Life of the Land's Motion to Strike, Filed July 21, 2021; and Certificate of Service," filed July 28, 2021 ("Hu Honua Opposition to LOL Motion to Strike").

²³"Hu Honua Bioenergy, LLC's Memorandum in Opposition to Tawhiri Power LLC's Motion to Strike Hu Honua Bioenergy, LLC's Motion for the Commission to Consider Act 82 and Address Its Impact

Filing Date	Filing Document
August 2, 2021	Consumer Advocate's response to LOL's Motion to Suspend ²⁴
August 3, 2021	Hu Honua Joinder to HELCO Motion to Strike LOL Motion to Suspend

II.

DISCUSSION

As a preliminary matter, the Commission observes that the procedural filings summarized above arise from three motions: (1) LOL's Motion for Reconsideration; (2) Tawhiri's Motion for Reconsideration; and (3) Hu Honua's Act 82 Motion. Accordingly, the Commission addresses these three motions first, as resolution of these underlying motions largely moots the subsequent procedural filings, with the exception of the Consumer Advocate's Motion for Leave to Respond, as discussed below.

on Order No. 37852 Reopening Docket, Filed July 26, 2021; and Certificate of Service," filed August 2, 2021.

²⁴"Division of Consumer Advocacy's Response to Life of the Land's Motion to Suspend Information Request Process Pending Resolution of Statement of Issues Motions," filed August 2, 2021.

A.

LOL's Motion For Reconsideration

LOL's Motion for Reconsideration seeks reconsideration and/or clarification of Order No. 37852, and is brought pursuant to HAR §§ 16-601-137 and 16-601-41.²⁵ LOL further requests a hearing on its Motion for Reconsideration pursuant to HAR § 16-601-141.²⁶ As a preliminary matter, the Commission notes that LOL's Motion for Reconsideration was filed on Monday, July 12, 2021, and is thus timely.²⁷

The Commission next addresses LOL's request for a hearing on its Motion for Reconsideration. First, LOL ignores

²⁵LOL Motion for Reconsideration at 1.

²⁶LOL Motion for Reconsideration at 2.

²⁷See HAR § 16-601-137 (providing that "the motion shall be filed within ten days after the decision or order is served upon the party"); and § 16-601-22 ("In computing any period of time specified under this chapter, [t]he last day of the period so computed shall included unless it is a Saturday, Sunday, or holiday in which event the period runs until the end of the next day which is not a Saturday, Sunday, or holiday."). See also, Order No. 37043, "Setting Forth Public Utilities Commission Emergency Filing and Service Procedures Related to COVID-19," filed March 13, 2020 (Non-Docketed) ("Order No. 37043"), at 12 (providing that during this emergency period, service by the Commission in docketed proceedings will be effectuated by the Commission Document Management System electronic distribution list, which notifies docket subscribers when a document is filed the same day or within a day of filing).

As the tenth day after June 30, 2021, was July 10, 2021, a Saturday, LOL's Motion for Reconsideration, filed on Monday, July 12, 2021, is considered timely.

HAR § 16-601-142, which provides that “[o]ral argument shall not be allowed on a motion for reconsideration, rehearing, or stay, unless requested by the [C]ommission or a commissioner who concurred in the decision.” Here, neither the Commission nor any Commissioner requests a hearing on LOL’s Motion for Reconsideration.

LOL cites to HAR § 16-601-141 in support of its request for a hearing, but the Commission finds this inapposite here. HAR § 16-601-141 provides: “[a] successive motion under this subchapter or section 16-601-124 submitted by the same party or parties and upon substantially the same grounds as a former motion which has not been considered or denied by the [C]ommission shall not again be considered.” The plain language of this rule does not provide for a hearing, nor does LOL’s Motion for Reconsideration explain how this rule supports its request for a hearing on its Motion for Reconsideration, particularly in light of HAR § 16-601-142.

Based on the above, the Commission denies LOL’s request for a hearing on its Motion for Reconsideration.

Turning to the substance of LOL’s Motion for Reconsideration, LOL argues that the Statement of Issues is too narrow, and focuses only on the GHG impacts of the Project.²⁸

²⁸LOL Motion for Reconsideration at 12.

In support thereof, LOL contends: (1) the Commission has discretion to rescind HELCO's waiver from the Framework for the Project on remand;²⁹ (2) the scope of issues on remand does not sufficiently address the Commission's public trust obligations;³⁰ (3) Order No. 37852 does not sufficiently articulate the scope of Statement of Issues No. 1;³¹ and (4) Order No. 37852 fails to require an environmental impact statement ("EIS") for the Project.³²

The Commission addresses each of these arguments in turn.

1.

Inclusion Of The 2017 Waiver

First, regarding the inclusion of HELCO's waiver on remand, LOL relies on a footnote in HELCO II in which the majority states: "We express no opinion as to the PUC's discretion, if any, to address the 2017 waiver; we merely hold that HELCO I and its remand instructions did not affect the waiver."³³ However,

²⁹See LOL Motion for Reconsideration at 12-15.

³⁰See LOL Motion for Reconsideration at 15-17.

³¹See LOL Motion for Reconsideration at 17-20.

³²See LOL Motion for Reconsideration at 20-31.

³³LOL Motion for Reconsideration at 15 (citing HELCO I at 8 n.3) (emphasis added).

taking into account the circumstances of this case, including the Court's rulings in HELCO I and HELCO II, the Commission does not believe consideration of the waiver from the Framework is appropriate on remand.

The Court clearly held in HELCO I that the waiver from the Framework was not part of the remand under HELCO I, and emphasized that "HELCO I did not disturb, modify, or vacate the 2017 waiver," and thus, "[b]ecause HELCO I had no impact on the 2017 waiver, the waiver was still in effect when the PUC re-opened Docket No. 2017-0122."³⁴ Further, in deciding HELCO I, the Court explicitly held that the Commission was required to consider the impact of GHGs related to the Project as part of its statutory duties under HRS § 269-6(b), strongly implying that it desired to see this analysis incorporated into the Commission's decision, rather than disposing of it based on the threshold waiver issue.³⁵ Accordingly, to consider the waiver from the Framework now, in light of the Court's explicit ruling that the waiver was not part of LOL's appeal in HELCO I, and thus, not part of the

³⁴HELCO II at 7 and 8.

³⁵See HELCO I, 145 Hawaii at 23-24, 445 P.3d at 695-696 ("Because the 2017 D&O does not reflect that the [Commission] explicitly considered the reduction of GHG emissions in approving the Amended PPA, we conclude that the [Commission] failed to comply with HRS § 269-6(b). . . . Without such explicit findings, this court cannot determine whether the [Commission] adequately considered GHG emissions as required by HRS § 269-6(b).").

Court's remand from HELCO II, as well as the Court's clear directives to consider GHG emissions under HRS § 269-6(b), would be inconsistent with the Court's remand instructions.³⁶

2.

The Commission's Public Trust Obligations

LOL's Motion for Reconsideration argues that the Statement of Issues in Order No. 37852 does not include the Commission's public trust obligations.³⁷ However, LOL does not elaborate on this argument or explain how the Statement of Issues, which is based directly on the Court's remand instructions in HELCO I and HELCO II, is inconsistent with the Commission's public trust obligations under HRS Chapter 269 and as defined by this Court.

HRS Chapter 269 governs the Commission. The Hawaii Supreme Court has concluded that "HRS Chapter 269 is a law relating to environmental quality that defines the right to a clean and healthful environment under article XI, section 9 by providing that express consideration be given to reduction of

³⁶See HELCO II at 6 ("No party in HELCO I made an argument about the 2017 waiver. There was no mention of the 2017 waiver in HELCO I. Likewise, our judgment in HELCO I made clear that this court was concerned with the 2017 D&O only to the extent it addressed the Amended PPA.").

³⁷LOL Motion for Reconsideration at 15.

[GHG] emissions in the decision-making of the Commission.”³⁸ This Court has further stated that “[t]his right to a clean and healthful environment includes the right that explicit consideration be given to reduction of greenhouse gas emissions in Commission decision-making, as provided for in HRS Chapter 269.”³⁹ In terms of fulfilling these statutory responsibilities, the Court has provided guidance regarding the procedural opportunities the Commission must provide docket participants to protect their due process to this constitutional right, as well as the explicit findings the Commission must make to ensure that it adequately considers these constitutional rights in rendering its decision.

Regarding procedural due process, this Court has held that “the Commission has the authority to set limitations in conducting the proceedings so long as the procedures sufficiently afford an opportunity to be heard at a meaningful time and in a meaningful manner on the issue of the Agreement’s impact on the asserted property interest.”⁴⁰ This is clearly reflected in the Court’s instructions in HELCO I, under which the Commission “must afford LOL an opportunity to meaningfully address the impacts of

³⁸In the Application of Maui Electric Company, Limited, 141 Hawai‘i 249, 264, 408 P.3d 1, 16 (2017) (“In re MECO”).

³⁹In re MECO, 141 Hawai‘i at 265, 408 P.3d at 17.

⁴⁰In re MECO, 141 Hawai‘i at 270, 408 P.3d at 22.

approving the Amended PPA on LOL's members' right to a clean and healthful environment, as defined by HRS Chapter 269."⁴¹

Regarding explicit findings the Commission is obligated to make in addressing statutory considerations, this Court previously held in HELCO I that in reviewing power purchase agreements under HRS Chapter 269, the Commission is required to "substantiate [its] finding by addressing the hidden and long-term environmental and public health costs of reliance on energy produced at the proposed facility," including "GHG emissions produced at earlier stages in the production process, such as fuel production and transportation."⁴² This Court has clarified that this requires consideration of out-of-state GHG emissions, as well.⁴³ These are all explicitly incorporated into the Statement of Issues established in Order No. 37852.

Thus, the basis for LOL's argument that the Statement of Issues excludes the Commission's public trust obligations is unclear. LOL does not identify any public trust resources that the Statement of Issues fails to protect within the scope of the Commission's authority, nor does it reconcile its allegations about the Commission's public trust obligations with the clear and

⁴¹HELCO II at 9 (citing HELCO I at 26, 445 P.3d at 698).

⁴²HELCO I, 145 Hawai'i at 24, 445 P.3d at 696.

⁴³In re Gas Co., LLC, 147 Hawai'i 186, 201-203, 465 P.3d 633, 648-650 (2020) ("In re Hawaii Gas").

explicit holdings in HELCO I and HELCO II, as well as In re MECO and In re Hawaii Gas, that require the Commission to consider the impacts of GHG emissions associated with the Project.

3.

Clarity Of Statement Of Issue No. 1

Ultimately, LOL's argument regarding Issue No. 1 appears to be that it is vaguely worded, and may be read so as to exclude certain processes involved with the production of energy at the Project -- for example, LOL queries whether the scope of Issue No. 1 is limited to impacts physically caused at the Project itself, or if it also includes associated impacts that occur off-site.⁴⁴

As discussed above in Section II.A.2, based on recent Court decisions, the Commission considers its public trust duties under HRS Chapter 269 to include a lifecycle GHG analysis of a project, such as the Hu Honua Project. Thus, in response to LOL's desire for clarification on this matter, the Commission affirms that Issue No. 1.a contemplates the lifecycle GHG emissions associated with the Project, not just those directly produced at the Project site.

⁴⁴See LOL Motion for Reconsideration at 18.

Environmental Impact Statement

Finally, LOL argues that the Statement of Issues on remand should include an EIS pursuant to HRS Chapter 343. However, upon review of LOL's arguments contained in its Motion, the Commission is not persuaded.

As a preliminary matter, consideration of whether an EIS is required for this Project is outside the scope of the Court's remand instructions in HELCO I.⁴⁵

Further, as LOL acknowledges in its Motion, the issue of the Project's injection wells are already being addressed before the State's Department of Health ("DOH").⁴⁶ To the extent these may form a basis for triggering the need for an EIS, DOH is already positioned to respond to any arguments about an EIS as a part of its proceedings, as well as any appeals, regarding the underlying injection wells.⁴⁷ Although LOL attempts to rebut this argument

⁴⁵C.f. HELCO II (holding that because the 2017 waiver was not raised as part of LOL's appeal in HELCO I, the vacatur of Decision and Order No. 34736 did not extend to the waiver issues, but was instead limited to the specific issue of providing LOL with due process to address the Project's GHG emissions impacts on LOL's members' right to a clean and healthful environment under HRS Chapter 269).

⁴⁶See LOL Motion for Reconsideration at 22-25.

⁴⁷The Commission takes administrative notice of pending proceedings regarding Underground Injection Control ("UIC") permit UH-3051 for Hu Honua Bioenergy, LLC: <https://health.hawaii.gov/sdwb/public-notices/> (noting that DOH's Safe Drinking Water Branch will open a new comment period for

by vaguely referring to “the Hawaii Supreme Court’s ruling that the Commission has an on-going requirement to address its public trust obligations,”⁴⁸ the Commission is not persuaded by LOL’s interpretation of the Court’s prior rulings.

As discussed above in Section II.A.2, the Court’s rulings have defined the Commission’s public trust duties through the explicit consideration of lifecycle GHG emissions associated with a utility project (both in- and out-of-state). However, under LOL’s construction, the Commission’s statutory duties would be expanded to address “public trust resources” that are beyond the delineated scope of HRS Chapter 269. Rather than focus on the GHG emissions and other explicit factors set forth in HRS § 269-6(b), LOL’s position seeks to require the Commission to address its concerns regarding an EIS for the injection wells at the Project site, when there are pending proceedings before DOH

Hu Honua’s second revision of its UIC application, and noting that “[a] permit to operate the injection wells will not be issued until DOH is satisfied with the results of all related actions.”). LOL notes that “[s]everal entities” intend to file a request for a contested case proceeding with DOH pursuant to a forthcoming “mandated public hearing” on this issue. LOL Motion for Reconsideration at 24. LOL further cites to its correspondence with DOH regarding the timing of DOH’s final report for public review on the injection wells in January 2021. LOL Motion for Reconsideration at 25.

⁴⁸LOL Motion for Reconsideration at 23.

directly addressing this very issue.⁴⁹ In addition to creating administrative confusion and inefficiency, this interpretation ignores the fact that the Legislature has explicitly authorized other government agencies to protect public trust resources and empowered them to promulgate rules and hold proceedings to that effect.

LOL, itself, recognizes this distinction, acknowledging that, "[o]f course, the Commission is not the primary or lead agency for protecting water resources."⁵⁰ LOL then elaborates that "[t]he law makes clear that the constitutional obligations to protect the public trust govern all agencies, including this Commission,"⁵¹ but the Commission does not read this as being inconsistent with recognizing the scope of its statutory authority. As discussed above, government agencies, acting in concert and pursuant to their statutorily delineated fields of authority, collectively protect public trust resources. This is exemplified by the present situation where the Commission is examining the GHG emissions associated with the Project as they

⁴⁹See LOL Motion for Reconsideration at 27-30; see also, id. at 30 (stating that "the proposed facility will directly affect numerous public trust resources, especially water, but also land, energy sources, and even air (which should also encompass the climate system.")).

⁵⁰LOL Motion for Reconsideration at 29.

⁵¹LOL Motion for Reconsideration at 29.

relate to HRS § 269-6(b)⁵² and DOH is investigating concerns with the Project's injection wells.⁵³ The Commission does not agree with LOL's construction, which may interfere and possibly conflict with the DOH's own ongoing investigation and proceedings before that agency, as well as result in administrative redundancies and confusion.

Thus, for the reasons discussed above, the Commission is not persuaded that the Statement of Issues must include consideration of the need for an EIS for the Project because it is outside of the limited scope of this Commission proceeding on remand.

In sum, LOL's Motion for Reconsideration is denied.

B.

Tawhiri's Motion For Reconsideration

Tawhiri also requests a hearing on its Motion for Reconsideration on July 12, 2021, and similarly cites to HAR § 16-601-137 and requests a hearing on its motion pursuant to

⁵²DOH is also responsible for addressing air emissions from the facility pursuant to HAR, Title 11, Chapter 60.1 ("Air Pollution Control") and has previously issued Hu Honua Covered Source Permit (CSP) No. 0724-01-C: <https://health.hawaii.gov/cab/hu-honua-bioenergy-llc-covered-source-permit/>.

⁵³See footnote 48, supra.

HAR § 16-601-141.⁵⁴ For the reasons discussed above in Section II.A regarding LOL's Motion for Reconsideration, the Commission: (1) finds Tawhiri's Motion for Reconsideration timely filed; and (2) denies Tawhiri's request for a hearing on its Motion for Reconsideration, pursuant to HAR § 16-601-142.

Turning to the substance of Tawhiri's Motion for Reconsideration, Tawhiri argues that the Statement of Issues should include the waiver from the Framework.⁵⁵ In support of this argument, Tawhiri maintains that HELCO II does not preclude the Commission from reviewing the 2017 waiver on remand.⁵⁶

This argument was also raised by LOL in its Motion for Reconsideration. In light of the Commission's resolution of this issue above in Section II.A.1, the Commission similarly denies Tawhiri's Motion for Reconsideration. As discussed above, the Commission does not believe consideration of the waiver from the Framework is consistent with the instructions and rulings provided by the Court in HELCO I and HELCO II.

In sum, Tawhiri's Motion for Reconsideration is denied.

⁵⁴Tawhiri Motion for Reconsideration at 1.

⁵⁵See Tawhiri Motion for Reconsideration at 6-9.

⁵⁶See Tawhiri Motion for Reconsideration at 8-9.

C.

Hu Honua's Act 82 Motion

Hu Honua's Act 82 Motion seeks clarification regarding footnote 35 of Order No. 37852, which provides that "to the extent a Party or Participant believes that the amendments to HRS § 269-6 effectuated by Act 82 warrant consideration, this procedural schedule offers an opportunity to make this case."⁵⁷ More specifically, Order No. 37852 acknowledged that "HRS § 269-6(b) was amended by Act 82, which was signed by Governor Ige on June 24, 2021[,]" but "[f]or purposes of this docket, the Commission does not believe that these amendments alter the basis for the [Hawaii Supreme] Court's interpretation of the Commission's statutory obligations under HRS §269-6(b), as previously set forth in In re MECO, HELCO I, and HELCO II."⁵⁸

Hu Honua contends that in light of Act 82, Session Laws of Hawaii 2021,⁵⁹ which amended HRS § 269-6, consideration of GHG emissions should be limited to impacts from fossil fuels related to the Project, rather than the entire Project, as was

⁵⁷Hu Honua Act 82 Motion at 1; see also, Order No. 37852 at 19 n. 35.

⁵⁸Order No. 37852 at 9 n. 20.

⁵⁹Available at:
[https://www.capitol.hawaii.gov/session2021/bills/GM1184 .PDF](https://www.capitol.hawaii.gov/session2021/bills/GM1184.PDF).

previously required under HELCO I.⁶⁰ Accordingly, "Hu Honua respectfully requests that the Commission fully consider and address the impact of Act 82 on each of the issues in the Statement of Issues set forth in the Commission's Order Reopening Docket [and] [t]o the extent the Commission disagrees with Hu Honua's interpretation of the plain language of Act 82, . . . requests an explanation of the Commission's basis and reasoning" ⁶¹

Hu Honua does not request a hearing on its Act 82 Motion.⁶²

As a preliminary matter, the Commission observes that, notwithstanding its title, Hu Honua's Act 82 Motion, in substance, is a motion for reconsideration and/or clarification of Order No. 37852. In support of this conclusion, the Commission observes that the basis for Hu Honua's Act 82 Motion arises directly from Order No. 37852, including the determination that Act 82 does not materially alter the Commission's statutory obligations under HRS § 269-6(b) for purposes of framing

⁶⁰See Hu Honua Motion Act 82 Motion, Memorandum in Support at 1-2.

⁶¹Hu Honua Act 82 Motion, Memorandum in Support at 3-4.

⁶²Hu Honua Act 82 Motion at 1.

the Statement of Issues.⁶³ Further, the specific relief sought by Hu Honua's Act 82 Motion is a revision to the Statement of Issues.⁶⁴

Under HAR § 16-601-137, a motion for reconsideration or clarification of a Commission decision or order "shall be filed within ten days after the decision or order is served upon the party" Order No. 37852 was filed on June 30, 2021. Pursuant to the Order No. 37043, setting forth the Commission's emergency filing and service procedures related to the COVID-19 pandemic, service by the Commission in docketed matters is accomplished through alert filings through a subscription to the Commission's Document Management Service ("DMS").⁶⁵ DMS alerts for filing are sent within several hours of filing; depending on the time of day of the filing, the alert may not be issued until the following business day. Thus, Order No. 37852, filed on Wednesday, June 30, 2021, at 11:10 a.m. was served, at the latest, by Thursday, July 1, 2021. As discussed above, a motion for reconsideration or clarification of Order No. 37852 was due no

⁶³Order No. 37852 at 9 n.20.

⁶⁴Hu Honua Act 82 Motion, Memorandum in Support at 2 ("Accordingly ,the Order Reopening Docket's Statement of Issues for determination in this proceeding must be restated to reflect the narrowing of the type of GHG emissions that must now be considered under the new law.") (emphasis in the original); and 25-26 (proposing a revised statement of issues).

⁶⁵Order No. 37043 at 12.

later than Monday, July 12, 2021.⁶⁶ Accordingly, Hu Honua's Act 82 Motion, filed July 20, 2021, was filed outside this ten-day window and is thus untimely. Based on the above, the Commission denies Hu Honua's Act 82 Motion as untimely.

Further, even assuming, arguendo, that Hu Honua's request to reconsider and/or clarify Order No. 37852 had been timely filed, the Commission is still not persuaded by Hu Honua's Motion.

First, upon review of the legislative history behind Act 82, the Commission is not convinced that it reflects a clear intent to exempt biomass projects from the Commission's review of GHG emission under HRS § 269-6.

House Bill 561 ("HB 561") initially proposed, in pertinent part, the following amendment to HRS § 269-6(b):

In making determinations of the reasonableness of the costs ~~[of]~~ directly pertaining to electric or gas utility system capital improvements and operations, the commission shall explicitly consider, quantitatively or qualitatively,

⁶⁶See HAR § 16-601-137 (providing that "the motion shall be filed within ten days after the decision or order is served upon the party"); and § 16-601-22 ("In computing any period of time specified under this chapter, [t]he last day of the period so computed shall be included unless it is a Saturday, Sunday, or holiday in which event the period runs until the end of the next day which is not a Saturday, Sunday, or holiday."). The tenth day after June 30, 2021, was July 10, 2021, a Saturday; alternatively, the tenth day after July 1, 2021, was July 11, a Sunday. Under either scenario, the deadline by which to file a motion for reconsideration or clarification of Order No. 37852 was Monday, July 12, 2021.

the effect of the State's reliance on fossil fuels on price volatility, export of funds for fuel imports, fuel supply reliability risk, and greenhouse gas emissions.⁶⁷

Thereafter, HB 561 was heard in various committees; upon being heard by the Committee on Commerce and Consumer Protection, the issue of "equally harmful effects of biomass" was raised in Committee Report No. 1523.⁶⁸ As a result, HB 561 was amended by House Bill No. 561, H.D. 2, S.D.2 ("HB 561, HD2, SD2") to include a preamble which read:

Section 1. The purpose of this Act is to reduce the State's reliance on fossil fuels by supporting energy efficiency and renewable energy generation. Specifically, this measure:

(1) Requires the public utilities commission to make determinations of the reasonableness of the costs pertaining to fossil fuel or biomass sourced electricity or gas utility capital improvements and operations, and to consider the effect of the State's reliance on fossil fuels and biomass based on certain factors;

(2) Requires the public utilities commission to determine on an individual basis whether the analysis is necessary for proceedings

⁶⁷Hu Honua Act 82 Motion, Memorandum in Support at 8 (citing H.B. No. 561, 31st Leg., Reg. Sess. (2021)). See also, <https://www.capitol.hawaii.gov/session2021/bills/HB561 .HTM>

⁶⁸See Hu Honua Act 82 Motion, Memorandum in Support at 11 (citing Committee Report No. 1523). See also, Committee Report No. 1523, available at: <https://www.capitol.hawaii.gov/session2021/CommReports/HB561 SD2 SSCR1523 .htm>

involving water, wastewater, or telecommunications providers; and

(3) Exempts the public utilities commission from conducting the analysis for a utility's routine system replacements or determinations that do not pertain to capital improvements or operations.⁶⁹

Additionally, HRS § 269-6(b) was amended to read, in pertinent part:

In making determinations of the costs ~~[of]~~ pertaining to fossil fuel or biomass sourced electricity or gas utility system capital improvements and operations, the commission shall explicitly consider, quantitatively or qualitatively, the effect of the State's reliance on fossil fuels and biomass⁷⁰

Subsequently, the Committee on Conference issued Committee Report No. 119, which resulted in House Bill No. 561, H.D. 2, S.D. 2, C.D. 1 ("HB 561 HD2, SD2, CD1"), which further amended HB 561 by removing the preamble added by HB 561, HD2, SD2, and reverted the pertinent language of HRS § 269-6(b) back to the following:

In making determinations of reasonableness of the costs ~~[of]~~ pertaining to electric or gas utility system capital improvements and operations, the commission shall explicitly consider,

⁶⁹H.B. No. 561, H.D. 2, S.D. 2, 31st Leg., Reg. Sess. (2021), available at https://www.capitol.hawaii.gov/session2021/bills/HB561_SD2_.HTM.

⁷⁰H.B. No. 561, H.D.2, S.D. 2, 31st Leg., Reg. Sess. (2021) available at https://www.capitol.hawaii.gov/session2021/bills/HB561_SD2_.HTM.

quantitatively or qualitatively the effect of the State's reliance on fossil fuels⁷¹

Thus, in practice, the final version of HB 561 (i.e., HB 561, HD2, SD2, CD1), which was subsequently signed into law as Act 82, reflects amendments that reverted the pertinent language of HRS § 269-6(b) back to the original language submitted in HB 561. Contrary to Hu Honua's argument, the Commission does not find that the removal of reference to "biomass" that occurred between Committee Report No. 1523 (as reflected in HB 561, HD2, SD2) and Committee Report No. 119 (as reflected in HB 561, HD2, SD2, CD1) evidences an intent to exempt biomass projects from the scope of HRS § 269-6(b). Rather, this appears to simply reflect a desire to return the bill to its original language, as proposed in HB 561, which relied on existing statutory language that already contemplates biomass projects, pursuant to the Court's decisions in HELCO I and HELCO II.

Indeed, a plausible explanation for the reversion back to the original language of HB 561 could be that Legislators felt that in light of the Court's interpretation of HRS § 269-6(b), as elucidated in HELCO I and HELCO II, explicit reference to

⁷¹H.B. No. 561, H.D.2, S.D. 2, C.D. 1, 31st Leg., Reg. Sess. (2021) available at https://www.capitol.hawaii.gov/session2021/bills/HB561_CD1_.HTM.

biomass projects as provided in House Bill No. 561, HD 1, SD 1, were superfluous.

Relatedly, being aware of the Court's interpretation of HRS § 269-6(b) in HELCO I and HELCO II, the Legislature could have explicitly provided that biomass projects are exempt, as they did for water, wastewater, and telecommunications providers, but did not do so.⁷² This reinforces the conclusion that the Legislature's intent was to preserve the *status quo* of HRS § 269-6(b), as it relates to biomass projects, with the understanding that the Court's rulings made explicit language unnecessary.

Second, the Commission is not persuaded that the Act 82 amendments alter the Court's reasoning underlying their decisions in HELCO I and HELCO II. In addition to the amendments discussed above, Act 82 resulted in the following change to HRS § 269-6(b):

In making determinations of reasonableness of the costs ~~[of]~~ pertaining to electric or gas utility system capital improvements and operations, the commission shall explicitly consider, quantitatively or qualitatively the effect of the State's reliance on fossil fuels on ~~[price]~~:

- (1) Price volatility ~~[, export]~~;
- (2) Export of funds for fuel imports~~[, fuel]~~'

⁷²See Act 85, incorporating amendments to allow for the exemption of water, wastewater, and telecom providers from the scope of HRS § 269-6(b).

(3) Fuel supply reliability risk[, ~~and greenhouse~~];
and

(4) Greenhouse gas emissions.⁷³

Hu Honua maintains that this fundamentally alters the premise of the Court's reasoning in HELCO I.⁷⁴ However, the Commission is not convinced. The relevant amendments to HRS § 269-6(b) merely shift the four identified considerations to arrange them in an enumerated list format. The underlying considerations themselves did not change. Hu Honua argues that the prior construction of this sentence somehow confused the Court and led it to mistakenly believe that the Legislature intended for the Commission to require a GHG analysis for all projects, including fossil fuel and biomass projects.⁷⁵ However, the Commission does not find this argument persuasive. The language and structure of the pertinent portion of HRS § 269-6(b) remains unchanged, and the Commission does not believe that the change in presentation of the four considerations fundamentally alters the Court's reasoning in HELCO I and related caselaw. Absent clear evidence that the Legislature intended to exempt biomass projects from the scope of HRS § 269-6(b), which,

⁷³H.B. No. 561, H.D.2, S.D. 2, C.D. 1, 31st Leg., Reg. Sess. (2021) available at https://www.capitol.hawaii.gov/session2021/bills/HB561_CD1_.HTM.

⁷⁴See Hu Honua Act 82 Motion, Memorandum in Support at 23-24.

⁷⁵Hu Honua Act 82 Motion, Memorandum in Support at 24.

as discussed above, the Commission does not find here, the Commission does not believe this relatively minor amendment to the structure of HRS § 269-6(b) evidences a shift in the Commission's statutory obligations as set forth in HELCO I and HELCO II, and related caselaw.

Thus, even assuming that Hu Honua's Act 82 Motion was timely filed, the Commission observes that it would still be denied based on the above.

D.

The Consumer Advocate's Motion To Respond

As discussed below, in light of the Commission's denial of LOL's and Tawhiri's respective Motions for Reconsideration, the Consumer Advocate's Motion to Respond is now technically moot, to the extent it sought to respond to those Motions. However, the Commission notes that the Consumer Advocate also proposes two non-substantive, clarifying revisions to the Statement of Issues, to wit:

1. What are the long-term environmental and public health costs of reliance on energy produced at the proposed facility?
 - a. What is the potential for increased air pollution due to the lifecycle GHG emissions ~~of directly attributed the Project, as well as from earlier stages in the production process?~~
2. What are the GHG emissions that would result from approving the Amended PPA?

3. Whether the total costs of energy under the Amended PPA, including but not limited to the energy and capacity costs ~~is~~are reasonable in light of the potential for GHG emissions.
4. Whether the terms of the Amended PPA are prudent and in the public interest, in light of the Amended PPA's hidden and long-term consequences.

Upon review, the Commission finds these revisions useful. As noted in Order No. 37852, the Statement of Issues was taken, literally, from the Court's decisions in HELCO I.⁷⁶ The Consumer Advocate's suggested revisions, while not changing the nature of the Statement of Issues, provide helpful clarifications, while remaining faithful to the Court's reasoning. As a result, the Commission partially grants the Consumer Advocate's Motion to Respond, and modifies the Statement of Issues as set forth above.

E.

Dismissal Of Remaining Procedural Motions

In light of the above, the Commission finds that that remaining procedural motions, and related joinders and oppositions, are moot. Specifically, the Commission finds as follows:

A. Hu Honua's Motion for Leave to Reply to LOL's Motion for Reconsideration, Hu Honua's Motion for Leave to Reply to

⁷⁶See Order No. 37852 at 7-9.

Tawhiri's Motion for Reconsideration, and HELCO's Motion for Leave to Reply to LOL and Tawhiri Motions for Reconsideration are all dismissed as moot based on the Commission's denial of LOL's and Tawhiri's respective Motions for Reconsideration;

B. Tawhiri's Motion to Strike and LOL's Motion to Strike are both dismissed as moot based on the Commission's denial of Hu Honua's Act 82 Motion;

C. LOL's Motion to Suspend is dismissed as moot based on the Commission's denial of LOL's Motion for Reconsideration, Tawhiri's Motion for Reconsideration, and Hu Honua's Act 82 Motion; and

D. HELCO's Motion to Strike LOL's Motion to Suspend is dismissed as moot in light of the Commission's dismissal of LOL's Motion to Suspend.

III.

ORDERS

THE COMMISSION ORDERS:

1. LOL's Motion for Reconsideration is denied.
2. Tawhiri's Motion for Reconsideration is denied.
3. Hu Honua's Act 82 Motion is denied.
4. The Consumer Advocate's Motion to Respond is granted in part. As a result, the Statement of Issues governing

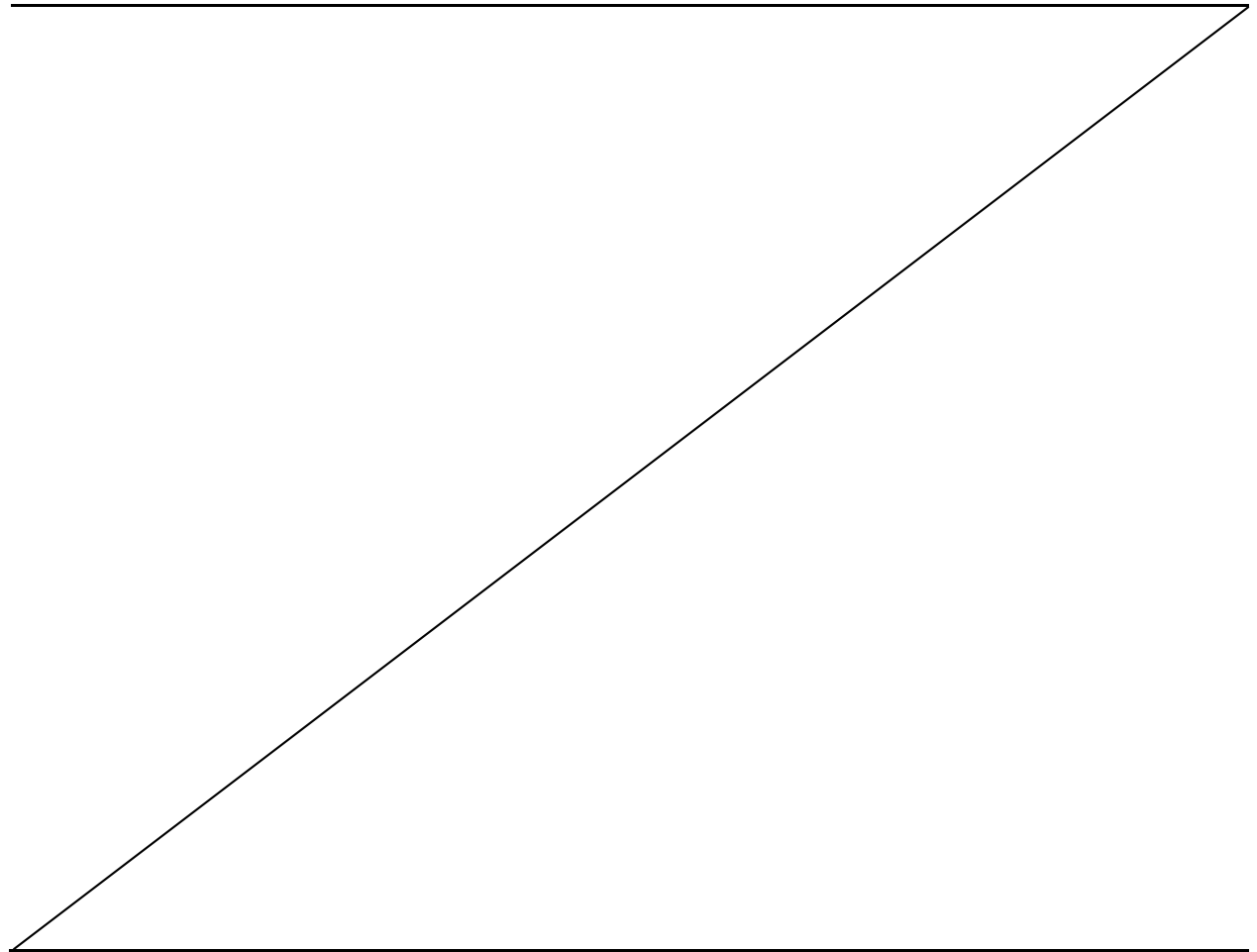
this remanded proceeding, as initially established in Order No. 37852, is modified as set forth above in Section II.D.

A. In all other respects, Order No. 37852 remains unchanged.

5. The following procedural motions are all dismissed as moot:

A. Hu Honua's Motion for Leave to Reply to LOL's Motion for Reconsideration;

B. Hu Honua's Motion for Leave to Reply to Tawhiri's Motion for Reconsideration;



C. HELCO's Motion for Leave to Reply to LOL and Tawhiri
Motions for Reconsideration;

D. Tawhiri's Motion to Strike;

E. LOL's Motion to Strike;

F. LOL's Motion to Suspend; and

G. HELCO's Motion to Strike LOL's Motion to Suspend.

DONE at Honolulu, Hawaii AUGUST 11, 2021.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By James P. Griffin
James P. Griffin, Chair

By Jennifer M. Potter
Jennifer M. Potter, Commissioner

By Leodoloff R. Asuncion, Jr.
Leodoloff R. Asuncion, Jr., Commissioner

APPROVED AS TO FORM:

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2017-0122.ljk

CERTIFICATE OF SERVICE

Pursuant to Order No. 37043, the foregoing order was served on the date it was uploaded to the Public Utilities Commission's Document Management System and served through the Document Management System's electronic Distribution List.

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COMMISSION

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